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IN THE

Supreme Court of the United States

OCTOBER TERM, ...

Supreme Court No. 73-14

Court of Appeals No. .....

JOSELITO S. ARCA and
CORAZON I. ARCA,
Petitioners,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	Page
1. Opinions Below	2
2. Jurisdiction	2
3. Question Presented	3
4. Statutes and Constitutional Provisions Involved	3
5. Statement of the Case	4
6. Reasons for Granting the Writ	5
7. Conclusion	14
Appendix "A" Order	15
Appendix "B"	16
Appendix "C" Decision on Request for Stay and Motion to Reopen	21
Appendix "D"	22
Appendix "E"	25
Appendix "F"	27
Appendix "G" Matter of Mangabat	28
Appendix "H"	34

CITATIONS

Constitutional Provisions: Page

Article I, Section 8, Clause 4 5

Statutes:

28 USC 1254(1) 2

The Immigration and Nationality Act of 1952, 66 Stat. 163 ff., as amended:

Section 242(b), 8 USC 1252(b)..... 5

Section 103, 8 USC 1103..... 5

Section 105(a)(2), 8 USC 1105(a)(2)..... 5

Section 241(b), 8 USC 1251(f).....3, 5, 6, 10-12, 24

Section 241(a)(1), 8 USC 1251(a)(1).....3, 10, 24

Section 241(a)(2), 8 USC 1251(a)(2).....3, 10, 11, 24

Section 212(a)(19), 8 USC 1182(a)(19).....3, 13, 22

Section 212(a)(20), 8 USC 1182(a)(20).....3, 13, 23

Cases:

Ferrante v INS, 399 F2d 98 (6 Cir. 1968)..... 9

Goday v Rosenburg, 415 F2d 1266 (9 Cir. 1969).. 8

INS v Errico, 385 US 214, 87 S. Ct. 473, 17 L Ed 2d 318 (1966) 7, 11, 12

Lee Fook Chuey v INS, 439 F2d 244 (9 Cir. 1970) r'hg den. (2/11/71) 8

Page

Mangabat v INS, CCA 9th, Docket #72-1333, Decided 4/13/73 7

Matter of Mangabat, Court of Immigration Appeals, Interim Decision #2131.....7, 9, 11

Muslemi v INS, 408 F2d 1196 (9 Cir. 1969)..8, 10, 12, 13

Tsaconas v INS, 397 F2d 946 (7 Cir. 1968)..... 9

Vargas v INS, 409 F2d 335 (5 Cir. 1968)..... 8

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IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, by and through their attorney, Paul C. Gracey, pray that a Writ of Certiorari issue to review the Order heretofore entered against them by the United States Court of Appeals, Sixth Circuit.

1. OPINIONS BELOW

The Order of the United States Court of Appeals, Sixth Circuit, filed without opinion on April 11, 1973, hereinafter set forth, (Appendix A, infra p. 15), is not yet officially reported.

The opinion of the United States Department of Justice Board of Immigration Appeals, now known as the Court of Immigration Appeals, was decided and filed on July 18, 1972, hereinafter set forth, (Appendix B, infra p. 16 *et seq.),* and is not officially reported.

The decision of the Special Inquiry Officer of the United States Department of Justice, Immigration and Naturalization Service was entered and filed on December 7, 1971, hereinafter set forth, (Appendix C, infra p. 21), and is not officially reported.

2. JURISDICTION

The Order of the United States Court of Appeals, Sixth Circuit, was entered and filed on April 11, 1973. There was no Order entered respecting a re-hearing nor was one requested; there was no Order entered granting an extension of time within which to petition for certiorari. The jurisdiction of this Court is invoked under Title 28 USC Section 1254(1).

3. QUESTION PRESENTED

The question presented is whether or not reversible error was committed by the Special Inquiry Officer and the Court of Immigration Appeals in denying petitioners' Motion to Re-open Deportation Proceedings in view of the fact that petitioners are relying on the provisions of Title 8 USC Section 1251 (f) (Appendix D, infra p. 24) to save them from deportation.

4. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory provisions involved herein are set forth in Appendix D, infra, p. 22 *et seq.*

	Immigration and Nationality Act of 1952
8 USC 1101 (a) (15) (B)	Section 101 (a) (15) (B)
8 USC 1182 (a) (19) (20)	Section 212 (a) (19)
8 USC 1201 (a) (2)	Section 221 (a) (2)
8 USC 1251 (a) (1)	Section 241 (a) (1)
8 USC 1251 (a) (2)	Section 241 (a) (2)
8 USC 1251 (f)	Section 241 (f)

5. STATEMENT OF THE CASE

Petitioners are natives and citizens of the Republic of the Philippines. They entered the United States lawfully in 1966 for the purpose of permitting Doctor Corazon I. Arca to specialize in pediatric medicine. Between 1966 and 1970, two children were born to petitioners in the United States, which children acquired United States citizenship at birth. Petitioners returned to their native Philippines in July, 1970, with their children, whose skin allergies severely worsened in the tropical climate of the Republic of the Philippines.

Petitioners almost immediately applied for and received B-2 visas, i.e., nonimmigrant visitors' visas, and entered the United States as nonimmigrant visitors in September 1970 wth their children, whose health then almost immediately improved.

Doctor Arca then petitioned for and received approval of a third preference immigrant status. Pending such application and before the approval, she was interviewed by an officer of the Immigration and Naturalization Service, in the absence of counsel, at which interview certain damaging statements were made. As a result of the interview and when she was notified of the approval of her third preference petition, petitioners were notified that there was no visa number immediately available for petitioner and that, although persons in their position were usually extended the privilege of remaining in the United States pending such availability, petitoners were being denied that privilege because of their "pre-conceived intent" to remain permanently in the United States when they applied for their B-2 visa, which intent was not repre-

sented to the American Consul when applying for such visas.

Thereafter, petitioners were ordered deported on the basis that they were visitors for pleasure who had remained in the United States for a longer time than permitted. A Motion to Re-open the deportation proceedings was denied by the Special Inquiry Officer. This decision was affirmed by the Court of Immigration Appeals and by the United States Court of Appeals, Sixth Circuit.

The Court of the first instance in the case at bar was the Special Inquiry Officer of the Immigration and Naturalization Service whose jurisdiction rests on Article I, Section 8, Clause 4 of the United States Constitution, whch gives congress authority to establish a uniform rule of naturalization. Statutorily, such jurisdiction rests on Title 8 USC Section 1252 which specifically grants jurisdiction in such cases cases to a Special Inquiry Officer. The Court of Immigration Appeals obtained its jurisdiction by virtue of Title 8 CFR Section 3.1 pursuant to Title 8 USC Section 1103. The jurisdiction o fthe United States Court of Appeals rests on Title 8 USC Section 1105 (a) (2).

6. REASONS FOR GRANTING THE WRIT

Petitioners submit that the United States Court of Appeals, Sixth Circuit, in affirming the decision of the Court of Immigration Appeals has rendered a decision clearly in conflict with a prior applicable decision of this Court, interpreting Title 8 USC 1251 (f), Immigration and Nationality Act of 1952, §241 (f) (Appendix D, infra p. 24).

Petitioners are aliens who are the parents of three children born in the United States which children are

thus United States citizens from the time of their birth. At no time has it been charged or shown that petitioners are undesirable aliens or that they are excludable from the United States on so-called qualitative grounds. When petitioners were notified to depart from the United States by means of form I-210, (Appendix E, infra p. 25) they were advised by means of a note at the bottom of the form continuing to the reverse side of the form as follows:

> "Although the beneficiary of a third preference visa petition and his spouse are usually permitted to remain in the United States pending the availability of visa numbers required for the filing of applications for permanent residence status, this privilege is not being extended in your case because of your pre-conceived intent to remain here at the time you applied for B-2 visas in Manila on August 7, 1970 and when you returned to this country as visitors on September 15, 1970."

Petitioners are "otherwise admissible" for the further reason that the INS told them so on form I-210, *supra.*

From the foregoing it appears that the petitioners fit all of the requirements of Title 8 USC 1251 (f), Immigration and Nationality Act of 1952, §241 (f), hereinafter referred to as §241 (f), set forth in Appendix D, infra p. 24).

Inasmuch as the Court of Appeals did not promulgate an opinion other than to say that they find no abuse of discretion by the Court of Immigration Appeals in denying the Motion to Re-Open Deportation Proceedings, it becomes necessary to look to the opinion filed by the Court of Immigration Appeals to determine the holding of the United States Court of Appeals, Sixth Circuit herein.

The Court of Immigration Appeals in its decision filed July 18, 1972 states that Section 241 (f) does not benefit an alien who entered as a nonimmigrant and cites the Court of Immigration Appeals' decision in *Matter of Mangabat,* decided March 29, 1972, being Interim Decision No. 2131 (Appendix G, infra p. 28 *et seq.) Matter of Mangabat* was subsequently appealed to the United States Court of Appeals for the Ninth Circuit, being docket number 72-1818 captioned as *Mangabat* v *Immigration and Naturalization Service* and was decided along with *Cabuco-Flores* v *Immigration and Naturalization Service,* docket number 72-1333, on April 13, 1973 (Appendix H, infra p. 34 *et seq.*) It is obvious from a reading of the Court of Immigration Appeals' decisions in the case at bar and in Matter of Mangabat that the Court based its decision not to disturb the decision of the Special Inquiry Officer on the holding that Section 241 (f) does not benefit an alien who entered as a nonimmigrant.

From the above reasoning, it is obvious that had the Court of Immigration Appeals decided that the foregoing section of the Act did benefit the petitioners, they would have been required to find that the Special Inquiry Officer did not have the discretion to order the petitioners deported and would have reversed his decision, reopened the proceedings and terminated them. Therefore, the whole question of abuse of discretion rests on the applicability of Section 241 (f).

The leading case on this question is *Immigration and Naturalization Service* v *Errico,* 385 US 214, 87 S Ct 473; 17 L Ed 2d 318 (1966). In that case, the alien misrepresented his skills and on that basis received a first preference quota status and entered the United States as an immigrant. One year later a child was born to the alien and

three years thereafter deportation proceedings were commenced on the ground that the alien was excludable at the time of entry as not of the proper status under the quota specified in the immigrant visa. The Government, in the *Errico* case, argued that the alien was not otherwise admissible at the time of entry because, had he not lied about his qualifications, he would not have been admitted because of the quota restrictions. This Court said in discussing the predecessor of Section 241 (f), which it said was not substantially changed:

> "This language would be meaningless if an alien who committed fraud for the purpose of evading quota restrictions would be deportable as not 'otherwise admissible at the time of entry.'" 385 US 222.

From this, it can be seen that the *Errico* case stands for the proposition that quantative limitations, i.e., quota restrictions, cannot preclude an alien from being "otherwise admissible" within the meaning of 241 (f), a proposition which has been consistently upheld and followed in later cases. See *Vargas* v *I.N.S.*, 409 F 2d 335 (5 Cir. 1968), *Goday* v *Rosenberg*, 415 F 2d 1266 (9 Cir. 1969), *Lee* and *Muslemi* v *I.N.S.*, 408 F. 2d 1196 (9 Cir. 1969), *Lee Fook Chuey* v *I.N.S.*, 439 F 2d 244 (9 Cir. 1970), petition for rehearing denied (February 11, 1971). An examination of the Notice to Depart given petitioners on October 28 1970, (Appendix E, infra p. 25) and the Notice of Third Preference Petition Approved dated October 15, 1970, (Appendix F, infra p. 27) shows that the only reasons petitioners were not admissible to the United States were the quota restrictions and the misrepresentations of petitioners' intentions at the time of obtaining the B-2 visas.

It then becomes necessary to determine whether or not there is any authority outside of decisions of the Court of Immigration Appeals and the decision of the United States Court of Appeals, Sixth Circuit, in the case at bar, which hold that section 241 (f) does not benefit an alien who entered as a nonimmigrant.

The Court of Immigration Appeals in its decision in *Matter of Mangabat, supra,* stated that the Courts of Appeals outside the Ninth Circuit have endorsed the Government's long-standing constructions of section 241 (f) that it does not benefit an alien who entered as a nonimmigrant, citing the cases of *Ferrante* v *I.N.S.,* 399 F 2d 98 (6 Cir. 1968) and *Tsaconas* v *I.N.S.,* 397 F 2d 946 (7 Cir. 1968). A close examination of these cases reveals that they do not stand for that proposition. In *Ferrante, supra,* the alien sought to rely on section 241 (f) without any attempt to show any fraud or misrepresentation by which the alien gained entry to the United States. The Court in *Ferrante,* held that 241 (f) did not apply because there was no fraud or misrepresentation by which entry was gained. It did not say that the section was not applicable to nonimmigrants. In *Tsaconas, supra,* again, petitioner sought to rely on section 241 (f) without making a showing of any fraud or misrepresentation. The Court said at 397 F 2d 846 at page 949:

> "Further, counsel for petitioner does not contend that petitioner entered the United States by fraud or misrepresentation nor was any evidence of this fact adduced by petitioner's counsel from which that conclusion may be inferred. Standing alone, a familial relationship is insufficient."

Again, the Court in *Tsaconas* held that 241 (f) was not applicable because there was no fraud or misrepresenta-

tion, and again, that case did not say that 241 (f) did not benefit aliens admitted as nonimmigrants.

A case in which the facts are almost completely the same as the case at bar is *Muslemi* v *I.N.S., supra.* In that case, petitioner was a native of India and citizen of Iran who, after discovering that the immigrant quotas for both Iran and India had been filled, applied for and received a temporary visitor's visa to the United States stating that he had intended to remain in the United States for no more than three months, whereas in fact, he intended to reside in the United States permanently. Almost immediately after the passing of his departure date and the commencement of deportation proceedings against petitioner, he married an American citizen and then during the deportation proceedings sought to rely on section 241 (f). Rather than proceeding against petitioner in that case as a temporary visitor who had overstayed, section 241(a) (2), (Appendix D, infra p. 24) the Government proceeded on the ground that he was excludable at the time of entry as an immigrant without a valid unexpired immigrant visa, Section 202 (a) (2), 241 (a) (1), (Appendix D, infra p. 24) and therefore argued that section 241 (f) did not apply because the ground for deportation was not based upon fraud at the time of entry. The Government also argued that Section 241 (f) could not apply to the petitioner as he entered as a nonimmigrant rather than as an immigrant. The Ninth Circuit held that they need not decide whether or not the nonimmigrant's status was material inasmuch as the alien in that case was charged with being excludable as an immigrant without a valid unexpired immigrant visa. The Court held that because the charge resulted directly from the alien's fraudulent concealment of his intention to remain in the country permanently, the benefits of section 241 (f) applied to the

alien in the *Muslemi* case. In the case at bar, there is no reason why the Government could not have charged petitioners with the same charge as that charged in the *Muslemi* case.

In the very recent case of *Mangabat* v *I.N.S., supra,* the Ninth Circuit takes a position which at first blush may seem to hold that section 241 (f) does not benefit aliens admitted as nonimmigrants. In that case, the charge against the alien was that she had overstayed the time permitted on her nonimmigrant visa and the charge was lodged under section 241 (a)(2) (Appendix D, infra p. 24) of the Act. The Court there sustained the deportation order on the ground that the charge of remaining after the expiration of the period permitted by the visitor's visa was not waived by section 241 (f) because it did not depend directly or indirectly upon the asserted misrepresentation in obtaining the visa. The Court quoted the Supreme Court in *Immigration Service* v *Errico*, 385 US 214, 217 (1966) where it said that section 241 (f) "waives any deportation charge that, results directly from the misrepresentation regardless of the section of the statute under which the charge was brought." The Ninth Circuit in *Mangabat* said that section 241 (f) is properly invoked only where the fraud is germane to the charge upon which the deportation is sought. The case at bar is clearly distinguishable from the *Mangabat* case in that a reading of petitioner's notice to depart advises them that the departure date was set because, and only because, they had misrepresented their intentions at the time of obtaining their visitor's visa, and entering the United States. It is therefore clear that the misrepresentation is germane to the charge and that the charge results directly from the misrepresentation found by the government. It is further clear that in the *Mangabat* case the only evidence of fraud

came from the testimony put forth by the petitioner at the deportation hearing, and was apparently unknown prior to that time; whereas in the case at bar, the Government, prior to deportation proceedings, made its own determination that there was a misrepresentation of petitioner's intentions, as a result of which it set a departure date and brought deportation proceedings based upon a charge of staying longer than that date.

It is submitted that the foregoing clearly shows that the United States Court of Appeals, Sixth Circuit and the Court of Immigration Appeals whose decision was affirmed by the Sixth Circuit have decided a Federal question, i.e., the interpretation of section 241 (f), in a way clearly in conflict with the applicable decision of this Court, that is, the case of *I.N.S.* v *Errico, supra.* The United States Court of Appeals should have reversed the Court of Immigration Appeals. Failure to do so is reversible error.

A comparison of the decision by the United States Court of Appeals, Sixth Circuit, in the case at bar with the decision of the Ninth Circuit on the applicability of Section 241 (f) to nonimmigrant visitors shows the two circuits to be in conflict. Since this Court's decision in *I.N.S.* v *Errico, supra,* so far as this writer has been able to determine, the case at bar is the only one in which a United States Court of Appeals has clearly held that §241 (f) is not applicable to a nonimmigrant, while the Ninth Circuit has held in *I.N.S.* v *Muslemi, supra,* that §241 (f) is applicable to one who entered as a nonimmigrant. This is so even though the Court in *Muslemi* said it was not so deciding. The *Muslemi* Court said it was not necessary to decide that question because the government charged the alien with entering the U.S. without a valid unexpired im-

migrant visa, (Appendix D, infra p. 24) Title 8 USC § 1182 (a) (20), Section 212 (a) (20) Immigration and Naturalization Act of 1952, rather than being charged as an alien who had procured a visa by misrepresentation, 8 USC 1182(a) (19), Section 212(a) (19) Immigration and Nationality Act of 1952 (Appendix D, infra p. 22), the rationale apparently being that he had fraudulently concealed his intention to remain in the United States permanently and therefore had a defective visa which is the same as no visa at all. However, the fact remains that *Muslemi* was originally issued a temporary visitor's visa, valid on its face. To that extent, the facts in *Muslemi* are no different than in the case at bar. In both cases, the misrepresentation of intentions were the real reason for the deportation charges. Because the Sixth and Ninth Circuits decided the cases differently, there remains a conflict. In fact, the Ninth Circuit in the *Mangabat* case, *supra*, specifically said that the *Muslemi* holding was not to the contrary when it said on page five of the printed opinion (Appendix H, infra p. 39 *et seq.*);

> "The holding of *Muslemi v Immigration and Naturalization Service, supra,* is not to the contrary, and, as suggested earlier, its rationale supports the result we reach here."

Even though petitioners in the case at bar were charged with overstaying and Muslemi was not so charged, petitioners here were given a departure date only because they were said to have misrepresented their intentions to gain entry. Thus, they overstayed a date that had been set because of the misrepresentation.

Thus, it is submitted that, in addition to the failure of the Sixth Circuit to follow this Court's applicable decision, there is a conflict between the Sixth and Ninth Circuits on the question here involved and this Court should grant certiorari on that basis also.

7. CONCLUSION

For the reasons aforementioned, petitioner does pray that a petition for writ of certiorari to the Court of Appeals for the Sixth Circuit be granted.

Respectfully submitted,

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Dated: June ...., 1973.

APPENDIX "A"

ORDER

(U. S. Court of Appeals—Sixth Circuit)

No. 72-1798

(Filed April 11, 1963)

Before: Celebrezze, Miller and Kent, Circuit Judges.

This is a petition to review a decision of the Court of Immigration Appeals denying a motion to reopen deportion proceedings. On consideration of the briefs and oral arguments, we find no abuse of discretion by the Court in denying the motion to reopen the proceedings. Accordingly, it is ORDERED that the decision of the Court of Immigration Appeals be, and it is hereby, affirmed.

Entered by Order of the Court

/s/ James A. Higgins,
Clerk

APPENDIX "B"

(U. S. Department of Justice—
Board of Immigration Appeals)

(Filed July 18, 1972)

Files: A17 386 957—Detroit
A14 976 619

In re: Joselito S. *Arca* and Corazon I. *Arca*

In Deportation Proceedings

Appeal

On Behalf of Respondents:

Paul C. Gracey, Esq.
1851 Guardian Bldg.
Detroit, Michigan 48226
(Brief filed)

On Behalf of I&N Service:

R. A. Vielhaber, Esq.
Appellate Trial Attorney
Adolph F. Angelilli, Esq.
Trial Attorney
(Statement filed in opposition)

Oral Argument: February 9, 1972

Charges:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2))—Nonimmigrant visitors for pleasure—remained longer than permitted
Lodged: None

Application: Reopening of deportation proceedings

This is an appeal from a decision of a special inquiry officer dated December 7, 1971, denying a motion to reopen the deportation proceedings. The Service opposes the motion. We affirm the decision and the appeal will be dismissed.

The respondents are husband and wife. Both respondents are 30 years of age and natives and citizens of the Philippines. They last entered the United States at San Francisco, California on or about September 15, 1970 as nonimmigrant visitors for pleasure authorized to remain in the United States in such status until November 28, 1970. They remained in the United States longer than authorized. In decisions of a special inquiry officer dated March 17, 1971, respondents were found deportable as charged in the Order to Show Cause, but were granted the privilege of voluntary departure, with an alternate order that if they failed to depart from the United States within 30 days, they shall be deported to the Philippines. Deportability was not contested. Appeal was waived and the decisions became final.

In their motion submitted to the special inquiry officer, respondents requested a reopening of the deportation proceedings or in the alternative that the special inquiry officer reconsider the status of the respondents and that they be permitted to remain in the United States pending the availability of visa numbers. The basis for denying the motion was that immigrant visas were not immediately available to either of the respondents as required by 8 C.F.R. 245.2(a)(2) to make them eligible for adjustment of status to that of a permanent resident and that there is no requirement to postpone deportation proceedings pending an alien's pursuit of such collateral remedies.

After a careful review of the entire record, we concur with the findings of the special inquiry officer.

However, on appeal to the Board, respondent requested reopening and termination of the deportation proceedings under section 241(f) of the Act. Other points raised on appeal were that the District Director should have allowed them to remain in the United States on the basis of the serious health problems of their United States citizen children; that the respondents were denied their right to legal representation when they were interviewed by an investigator of the Service; and that the information obtained from this interview should be suppressed because it influenced the District Director in instituting the deportation proceedings.

The sworn statement obtained on October 7, 1970 was in connection with the enforcement of the immigration laws and was in relation to the female respondent's application for a visitor's visa at the American Embassy in Manila on August 7, 1970 and her intentions to remain in the United States permanently at the time she returned to the United States on September 15, 1970. Under section 287(b) of the Act, the Service has the power and authority to take a sworn statement concerning the privilege of any person to enter, re-enter, pass through, or reside in the United States or concerning any matter which is material or relevant to the enforcement of this Act and the administration of the Service.

The law and regulations make no provision for the presence of counsel in the type of examination and interrogation that was conducted in obtaining this sworn statement. In informing the female respondent that she had the right to remain silent, to have a lawyer present, etc., the Service was attempting to conform with the standards

set by the Supreme Court in criminal cases. The interrogation and obtaining the sworn statement were civil and not criminal in nature and there is no clearly defined right to have the assistance of counsel. In this case there was no requirement to advise the female respondent of her right to counsel. However, after such advice was given, she voluntarily agreed to answer the questions. Therefore, we find that respondelnt's lack of representation at the time she was interviewed and the sworn statement obtained were not violations of due process.

There is no merit to the contention of the respondent that the information obtained from the interview be suppressed because it influenced the District Director in instituting the deportation proceedings. As we stated in *Matter of Geronimo,* Interim Decision 2077 (BIA 1971) " . . . it is within the District Director's prospective discretion whether to institute deportation proceedings aganst a deportable alien or temporarily to withhold such proceedings. Where such proceedings have been begun, it is not the province of the special inquiry officer (or of this Board on appeal) to review the wisdom of the District Director's action in starting the proceedings, but to determine whether the deportation charge is sustained by the requisite evidence . . .".

Under 8 C.F.R. 243.4, a request for a stay of deportation by an alien under a final administrative order of deportation is a matter solely within the discretion of the District Director. Since the respondents are under a final administrative orler of deportation, the serious health problems of their United States citizen children are matters for consideration by the District Director in connection with an application for stay of deportation.

Because on appeal the respondents requested reopening and termination of the proceedings under section

241(f) of the Act, we deferred action on the appeal pending decision by the Supreme Court on this issue in *INS* v *Vitales*, No. 71-431, *cert. granted* 404 U.S. 983. The Supreme Court has now terminated that case inconclusively by vacating the judgment of the Court of Appeals and remanding with directions to dismiss the petition for review 405 U.S. 983 (March 20, 1972). We conclude that we should now act on the appeal. See *Matter of Mangabat*, Interim Decision 2131 (BIA 1972). For the reasons stated in *Matter of Mangabat*, *supra*, we adhere to the view that section 241(f) does not benefit an ailen who entered as a nonimmigrant.

After a careful evaluation of the entire record, including the representations made on appeal, we find no reason to reverse the decision of the special inquiry officer. The respondents have not met the clear requirements necessary for reopening under the regulations. Accordingly, the following order will be entered.

Order: It is ordered that the appeal be and the same is hereby dismissed.

/s/ Louisa Wilson,
Acting Chairman

APPENDIX "C"

DECISION OF THE SPECIAL INQUIRY OFFICER ON REQUEST FOR STAY OF DEPORTATION AND MOTION TO REOPEN

(United States Department of Justice—
Immigration and Naturalization Service)

A14 976 619

A17 386 957

Pursuant to 8 CFR 242.2 and 243.4, the above-named respondent has applied for a stay of deportation in connection with a motion to reopen—motion to reconsider. Upon consideration of the representations and submissions made by and on behalf of the respondent and the Service, I will adopt the position of the Service as set out by the Trial Attorney in his statemtnt opposing the motion to reopen dated May 25, 1971.

ORDER: IT IS ORDERED that the motion to reopen be and the same is hereby denied.

IT IS FURTHER ORDERED, however, that deportation of the respondents be stayed pending the timely taking of an appeal from this determination.

/s/ R. F. Bode
Special Inquiry Officer

Date: December 7, 1971

Place: Detroit, Michigan

Copy of this decision has been served on the respondents and the Service.

APPENDIX "D"

8 USC 1101 (a) (15) (B), Immigration and Nationality Act of 1952 §101(e)(15)(B)

(a) As used in this chapter—

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

(B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

8 USC 1182 (a) (19), Immigration and Nationality Act of 1952 §212 (a) (19)

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact;

8 USC (a) (20), Immigration and Nationality Act of 1952 §212(a) (20)

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(20) Except as otherwise specifically provided in this chapter, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 1181(a) of this title;

8 USC 1201 (a) (2), Immigration Nationality Act of 1952 §221 (a) (2)

(a) Under the conditions hereinafter prescribed and subject to the limitations prescribed in this chapter or regulations issued thereunder, a consular officer may issue

(2) to a nonimmigrant who has made proper application therefor, a nonimmigrant visa, which shall specify the classification under section 1101 (a) (15) of this title of the nonimmigrant, the period during which the nonimmigrant visa shall be valid, and such additional information as may be required.

8 USC 1251 (a) (1), Immigration and Nationality Act of 1952 §241 (a) (1)

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

8 USC 1251 (a) (2), Immigration and Nationality Act of 1952 §241 (a) (2)

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported, who—

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States;

8 USC 1251 (f), Immigration and Nationality Act of 1952 §241(f)

(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

APPENDIX "E"

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service
333 Mt. Elliott Street

Detroit, Michigan 48207 Telephone: 226-3276

Please refer to this file number
A14 976 619
A17 386 957

October 28, 1970

Corazon I. and Joselito S. Arca
5525 Harvard Road
Detroit, MI 48224

Please note the below checked action which has been taken in your case.

[X] In accordance with a decision made in your case, you are required to depart from the United States at your own expense on or before November 28, 1970.

You must notify this office, Room No....., on or before November 16, 1970 of the arrangements you have made to effect your departure, including the date, place, and manner.

Failure to depart on or before the specified date may result in the withdrawal of voluntary departure and action being taken to effect your deportation.

If there is a bond outstanding in our case, you are warned that to expedite cancellation of the bond and re-

turn of the collateral posted, you must make advance arrangements with this office to have your departure witnessed by an officer of this Service.

At the time of your departure, do not fail to surrender Form I-94, in accordance with instructions on the reverse of that form.

Very truly yours,

/s/ Thomas M. Pederson
District Director

Note: Although the beneficiary of a third preference visa petition and his spouse are usually permitted to remain in the United States pending the availability of visa numbers required for the filing of applications for permanent resident status, this privilege is not being extended in your case because of your pre-conceived intent to remain here at the time you applied for B-2 visas in Manila on August 7, 1970 and when you returned to this country as visitors on September 15, 1970.

APPENDIX "F"

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service
333 Mt. Elliott Street
Detroit, Michigan 48207

Notice of Third Preference Petition Approved Under Section 203(a)(3) of the Immigration and Nationality Act, as Amended.

Name of Beneficiary: Corazon Intano Area

File No.: A14 976 619 Date of Notice: 10-15-70

Country of Birth: Philippines Occupation: Physician

Date Petition Filed: 9-18-70

Date to Which Petition is Valid: 10-14-71

Please note the items below which are indicated by an "x" marks concerning this petition.

[X] The petition has been approved. The petition states that the beneficiary is in the United States and will apply for adjustment of status to that of a lawful permanent resident. A visa number is not presently available; therefore, the beneficiary may not apply for adjustment of status to that of a permanent resident. The beneficiary has been or will be notified concerning his stay in the United States.

[X] Remarks: See attached Form I-210 with instruction for your departure. You should advise this office to which American Consulate abroad you desire the

approved petition forwarded since you will not be permitted to remain in the United States to apply for permanent resident status.

Name and address of Petitioner: Mail to:
Corazon I. Arca
5525 Harvard Rd.
Detroit, MI 48224

Very truly yours

/s/ Thomas M. Pederson
District Director

APPENDIX "G"

MATTER OF MANGABAT

EXHIBIT "C"

Interim Decision #2131

In Deportation Proceedings
A-19049517

Decided by Board March 29, 1972

(1) The fact that a lower federal court has disagreed with a legal conclusion of the Board does not of itself require that the Board recede from that conclusion; the Board's jurisdiction is nationwide and the contrary ruling of a reviewing court in one district or circuit is not necessarily dispositive.

(2) The provisions of section 241(f) of the Immigration and Nationality Act, as amended, do not benefit an

alien who entered the United States as a nonimmigrant. [The interpretation in *Matter of Cadiz*, 12 I & N. Dec. 560; *Matter of Pon*, Interim Decision No. 2018; *Matter of Koryzma*, Interim Decision No. 2033; and *Matter of Yee*, Interim Decision No. 2104, adhered to notwithstanding *Vitales* v. *I & NS*, 443 F.2d 343 C.A. 9, 1971), vacated (*I&NS* v. *Vitales*, No. 71-431 (Mar. 20, 1972)) and remanded with instructions to dismiss petition for review.]

Charge:

Order: Act of 1952—Section 241(a)(2) [8 U.S.C. 1251 (a)(2)] Non-immigrant—remained longer than permitted.

On Behalf of Respondent:

David C. Marcus, Esquire
215 West Fifth Street
Los Angeles, California 90013

This is an appeal from an order of a special inquiry officer dated October 21, 1971, denying on reconsideration respondent's motion to reopen and terminate the proceedings under section 241(f) of the Immigration and Nationality Act. The appeal will be dismissed.

Respondent is a 34-year-old unmarried female alien, a native and citizen of the Philippines. She was admitted to the United States on May 19, 1968 as a non-immigrant visitor for a period to expire September 20, 1968 and remained longer than permitted. At a deportation hearing before a special inquiry officer on March 12, 1971, at which she was represented by other counsel, respondent admitted the truth of the factual allegations of the Order to Show Cause and conceded deportability on the above-stated

charge. The special inquiry officer found her to be deportable and granted her until June 1, 1971 to depart voluntarily in lieu of deportation. There was no appeal and the special inquiry officer's order became administratively final. Respondent failed to depart and the alternate order for her deportation to the Philippines vested.

On July 12, 1971, through present counsel, respondent filed a motion to reopen and terminate. In it she alleged that when she applied to the American consul in the Philippines for her nonimmigrant visa, she did not disclose a secret intention to remain here permanently; that on December 12, 1969, at Los Angeles she gave birth to a daughter, who is a United States citizen; and that by reason of her fraud and parentage of a United States citizen child, she is entitled to termination of the proceedings under section 241(f) of the Act. In an order dated August 16, 1971, the special inquiry officer denied the motion for the stated reason that the respondent had submitted no evidence to corroborate her self-serving confession of fraud.

Counsel thereupon moved for reconsideration, citing *INS* v *Errico*, 385 U.S. 214, (1966) and the ensuing decisions of the United States Court of Appeals for the Ninth Circuit in *Muslemi* v. *INS*, 408 F.2d 1196 (1969); *Lee Fook Chucy* v. *INS*, 439 F.2d 244 (1971); *United States* v. *Osuna-Picos*, 443 F.2d 907 (1971); and *Vitales* v. *INS*, 443 F. 2d 343 (1971). In the order now before us on appeal, the special inquiry officer denied the motion, concluding that the evidence presented did not make out a case of fraud within the meaning of Section 241(f).

While this appeal was pending before us, the Supreme Court granted the Services' petition for certiorari to review the *Vitales* decision, *INS* v. *Vitales*, 404 U.S. 983.

We held in abeyance further action in this case and in certain other cases presenting the same issue, pending definitive decision by the Supreme Court in *Vitales*. The Supreme Court has now terminated that case inconclusively.[1] For the reasons stated below, we shall proceed to a decision on this appeal, rather than waiting further for a possible definitive Supreme Court decision in a case yet to be filed.

This Board has consistently taken the position that section 241(f) does not benefit an alien who entered as a nonimmigrant, *Matter of Cadiz*, 12 I & N Dec. 560 (BIA 1968); *Matter of Pon*, Interim Decision 2018 (BIA 1959); *Matter of Korzyma*, Interim Decision 2033 (BIA 1970); *Matter of Yee*, Interim Decision 2104 (BIA 1971). That position is consonant with and indeed required by, the rationale of the Attorney General's decision in *Matter of Lee*, Interim Decision 1960 (BIA 1967; A.G. 1969); see especially footnote 4. The Courts of Appeal outside the Ninth Circuit have endorsed our longstanding construction of the statute, *Ferrante* v *INS*, 399 F.2d 98, 104-105 (6 Cir. 1968); *Tsaconas* v. *INS*, 397 F.2d 946, 948-949 (7 Cir. 1968); *Rutledge* v. *Esperdy*, 200 F Supp. 231, 233 (S.D. NY. 1961); affirmed per curiam 297 F.2d 532 (2 Cir. 1961). The Ninth Circuit alone has adhered to the expansive view of the underlying Congressional design on which its decisions are bottomed.

Where a reviewing court rejects our construction of a statute, in treating with the same issue in subsequent

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[1] Miss Vitales left the United States and it was suggested to the Court that this rendered the issue either moot or unreviewable under section 106(c) of the Act. On March 20, 1972, the Court entered an order vacating the Court of Appeals judgment and remanding the case to that court with directions to dismiss the petition for review, *INS* v. *Vitales*, 404 U.S. —, No. 71-431.

cases we try to reach an accomodation compatible both with respect for the court's judgment and with the needs of effective administration of the law. The fact that a lower federal court has disagreed with a legal conclusion of this Board does not of itself require us to recede from that conclusion. The Board's jurisdiction is nationwide and we hear appeals from Service decisions in all parts of the country. The contrary ruling of a reviewing court in one district or one circuit is not necessarily dispositive. As we have seen with respect to section 241(f), a conflicting view may be expressed by a court in another jurisdiction.

Where further appellate review is not sought because it is concluded administratively that the adverse court decision is correct, we recede from our former position and accept the court's position as our own in future cases. See *Matter of Lim*, Interim Decision 1947 (BIA 1969). Where, however, the Government's failure to seek further appellate review is due to factors other than acquiescence, we try to preserve the status quo pending definitive decision in another case. While continuing to apply our own legal conclusion in other jurisdictions, we may apply the contrary conclusion in cases arising within the jurisdiction of the court whch rendered it, *Matter of Amado and Monteiro*, Interim Decision 1951 (BIA 1969).

It was to avoid this unhappy solution that we have withheld action on appeals presenting this section 241(f) issue in cases which would normally be reviewed in the Ninth Circuit, pending definitive decision in *Vitales*. In view of the inconclusive termination of that case, we could continue to hold the many cases we now have, until such time as a suitable case arising in another circuit becomes the vehicle for ultimate Supreme Court decision. That will

take some time. We believe that effective administration requires that we act now on the cases before us, without further delay.

In declining to apply the cited Ninth Circuit decisions in this and other cases reviewable in that circuit, we mean no disrespect for that court. Since the issues have already been crystallized, briefed and defined in the cited cases, our action now should pave the way for prompt decision in that court and prompt review in the Supreme Court. The construtcion of section 241(f) which we here apply is one which the Attorney General has approved, and his decision is binding on us. The Ninth Circuit's view represents a minority position among the circuits. The Solicitor General's challenge to it in petitioning for certorari in *Vitales* negates any notion of administrative acquiescence. The Supreme Court's action in granting certiorari indicates that a substantal question is presented.

Under the circumstances, we feel justified in continuing to adhere to the view that section 241 (f) does not benefit an alien who entered as a nonimmigrant. We therefore dismiss the appeal.

Order: The appeal is dismissed.

APPENDIX "H"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Lourdes Cabuco-Flores, *Petitioner,* **vs.** Immigration & Naturalization Service, *Respondent.*	No. 72-1333
Genevieve L. Mangabat, *Petitioner,* **vs.** Immigration & Naturalization Service, *Respondent.*	No. 72-1818

[April 13, 1973]

On Petition to Review a Decision of the
United State Immigration & Naturalization Service

Before: Browning, Hufstedler, and Wallace,
Circuit Judges.

Browning, Circuit Judge:

These petitions for review raise a common question under section 241(f) of the Immigration and Nationality Act, 8 U.S.C. § 1251(f), an ameliorative statute providing that in some circumstances fraud or misrepresentation by an entering alien who has close family ties with a citizen or lawfully admitted permanent resident may be

waived as a ground for deportation.[1] The issue is whether section 241(f) applies to deportation of a temporary visitor on the ground that the visitor has overstayed the period authorized. We hold that it does not.

Both petitioners are aliens, citizens of the Philippine Islands. Each entered the United States as a nonimmigrant visitor for a stipulated period. After entry, each gave birth to a child, a United States citizen by birth. Deportation proceedings were commenced against each on the ground that she had remained longer than permitted on her visa, and was therefore deportable under section 241(a) (2) of the Act, 8 U.S.C. §1251(a)(2). Each defended on the ground that she was saved from deportation by section 241(f) because when she applied for her visitor's visa she fraudulently concealed an intention to remain in the United States permanently.

The Board of Immigration Appeals rejected the defense as to petitioner Mangabat on the ground that section 241(f) applies only to persons who enter as immigrants and not to those who enter as nonimmigrants. The Board rejected the defense as to petitioner Cabuco-Flores on the ground that her testimony established that she intended to remain permanently only if she could do so lawfully and thus failed to establish the requisite fraud.[2]

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[1] Section 241(f) of the Act, 8 U.S.C. § 1251(f) reads:

> The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

[2] See *Bong Youn Chop* v. *Barber*, 279 F.2d 642, 645-46 (9th Cir. 1960).

We sustain the deportation orders on another ground, namely, that the charge of remaining after the expiration of the period permitted by each petitioner's visitor's visa was not waived by section 241(f) because it did not depend directly or indirectly upon the asserted misrepresentation in obtaining the visa.

Literally, section 241(f) waives deportation of aliens only "on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation," in violation of section 212(a)(19), 8 U.S.C. §1182(a)(19). The Supreme Court rejected a literal reading of section 241 (f) in *Immigration Service* v. *Errico,* 385 U.S. 214, 217 (1966), noting that by consistent administrative interpretation the section "waives any deportation charges that *results directly* from the misrepresentation regardless of the section of the statute under which the charge was brought" (emphasis added).

Thus, while not limited to the single ground for deportation found in section 212(a)(19), section 241(f) is properly invoked only when the fraud is "germane to the charge" upon which deportation is sought, *Muslemi* v. *Immigration & Naturalization Service,* 408 F.2d 1196, 1198 (9th Cir. 1969) *(see also Hames-Herrera* v. *Rosenberg,* 463 F.2d 451, 454 (9th Cir. 1972); *Jolley* v. *Immigration & Naturalization Service,* 441 F.2d 1245, 1251-52, 1254 (5th Cir. 1971); *Loos* v. *Immigration & Naturalization Service,* 407 F.2d 651, 654 (7th Cir. 1969); *Tsaconas* v. *Immigration & Naturalization Service,* 397 F.2d 946 (7th Cir.

1968)),[3] and the charge relates to entry. *Hanes-Herrera* v. *Rosenberg, supra, Khadjenouri* v. *Immigration & Naturalization Service,* 460 F.2d 461, 462 (9th Cir. 1972); *Ferrante* v. *Immigration & Naturalization Service,* 399 F. 2d 98, 104 (6th Cir. 1968); *Tsaconas* v. *Immigration & Naturalization Service, supra.*[4]

Section 241(f) applies only to that fraud or misrepresentation which the government must prove to establish the ground relied upon for deportation; in some circumstances it excuses such fraud. It does not make the alien's fraud an affirmative defense, independently exculpatory without regard to the proof required to establish the ground for deportability relied upon by the government.

In these cases petitioners were ordered deported because the period of their authorized temporary stays had expired. The government's case was completed upon proof that petitioners were admitted as nonimmigrant visitors for a temporary period, the period had elapsed, and petitioners had not departed. The charge had nothing to do with petitioner's entry; lawfulness of their entry was assumed. Proof that petitioners' visas were procured by fraud was irrelevant to the charge. Giving full effect to

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[3] "The statutory waiver excuses charges which are incidental to the misrepresentation, such as perjury, improper quota charge, entry without inspection, and lack of proper documents (when waiver can be simultaneously granted). However, the mere fact that the alien claims to have made a misrepresentation at the time of entry does not excuse him from deportation validly ordered on another charge, not related to the misrepresentation" (footnotes omitted). Gordon & Rosenfield, Immigration Law & Procedure § 4.7c, 4-41.

See also *Ntovas* v. *Ahrens,* 276 F.2d 483, 484 (7th Cir. 1960) (decided under § 7 of the 1957 Act). See note 5.

[4] See also *Rutledge* v. *Esperdy,* 200 F. Supp. 231 (S.D.N.Y. 1961), *affirmed* on the basis of district court's opinion 297 F.2d 532 (2d Cir. 1961), decided under § 7 of the 1957 Act. See note 5.

the section 241(f) waiver, the government's proof of the ground relied upon for deportation was unimpaired. Accordingly, the orders of deportation are not barred by section 241(f).

This interpretation is consistent with the section's language. It is also in harmony with the section's purpose., for Congress intended no more than to grant relief to aliens "facing expulsion or deportation because they had gained entry through misrepresentation." *Immigration Service* v. *Errico, supra,* 385 U.S. at 220-21.[5] It avoids the anomalous consequence that an alien may escape deportation simply by "substitut[ing] for his own convenience a ground not involved in the deportation proceedings." *Ntovas* v. *Ahrens,* 276 F.2d 483, 484 (7th Cir. 1960). *See also Tsaconas* v. *Immigration & Naturalization Service, supra,* 397 F.2d 946, 948. It avoids the constitutional question raised by petitioner Cabuco-Flores, who points out that if section 241(f) is held to apply, but the factual determination of the Board in her case is upheld, petitioner Mangabat will be allowed to remain in this country, while petitioner Cabuco-Flores, whose situation is in all respects the same except that she did not enter with a fraudulent intent, will be deported.

This construction averts the wholesale frustration of statutory limitations on immigration foreseen by the government, which suggests that a fraudulent intent to remain cannot be detected at the time of entry, nor disproved during a deportation proceeding.

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[5] The Court was referring to § 7 of the 1957 Act, Pub. Law 85-316, 71 Stat. 639. "The present § 241(f) is essentially a re-enactment of § 7 of the 1957 Act. The legislative history leaves no doubt that no substantive change in the section was intended." *Immigration Service* v. *Errico,* 385 U.S. 214, 223 (1966).

Finally, this construction limits the impact of the apparent inconsistency between section 241(f)'s automatic waiver where fraud is involved, and the severely limited conditions under which aliens having close family ties in the United States can be relieved of various other grounds of deportation. *See* section 244 of the Act, 8 U.S.C. §1254; section 212(e); 8 U.S.C. § 1182(e); section 212(h), 8 U.S.C. § 1182(h).

The holding of *Muslemi* v. *Immigration & Naturalization Service, supra,* is not to the contrary, and, as suggested earlier, its rationale supports the result we reach here. Muslemi was not charged with overstaying; indeed, he was notified that deportation proceedings were to be instituted aaginst him one day before his temporary visa expired. 408 F.2d at 1198. Deportation was sought on the ground that he had entered without an immigrant visa and was therefore excludable under section 212(a)(20), 8 U.S.C. § 1182(a)(20), and deportable under section 241 (a) (1), 8 U.S.C. § 1251(a)(1). 408 F.2d at 1197. To prove its charge, the government was required to establish that Muslemi entered the United States as an immigrant, that is, as one who intended to remain in this country permanently. The government was required to prove that Muslemi had obtained his temporary visitor's visa by fraudulently misrepresenting his intentions. Thus, the "misrepresentation was germane to the deportation charge" (408 F.2d at 1199)—waiver of the fraud barred proof essential to that charge.

The rule we adopt is also consistent with *Lee Fook Chuey* v *Immigration & Naturalization Service,* 439 F.2d 244 (9th Cir. 1971). Lee Fook Chuey entered the United States under a false claim of citizenship derived from his father. He wa sordered deported on the charge that he was

an alien, who entered without inspection in violation of section 241(a)(2), 8 U.S.C. § 1251(a)(2). Obviously, proof of this charge required the government to establish that petitioner's claim of citizenship was false. Section 241(f) was therefore determinative.

However, *Vitales* v. *Immigration & Naturalization Service,* 443 F.2d 343 (9th Cir. 1971), cannot be reconciled with our present holding: Section 241(f) was held to bar Vitales' deportation on the ground that she had overstayed the period permitted by a nonimmigrant visitor's visa obtained by fraudulently concealing an intention to remain in this country permanently.

The Supreme Court granted certiorari in *Vitales,* 404 U.S. 983 (1971). Thereafter, petitioner left the country voluntarily. The Supreme Court vacated the judgment of this court, and remanded with instrutcions to dismiss the petition. 405 U.S. 983 (1972). This court's decision in *Vitales* is therefore no longer binding precedent. *See United States* v. *Munsingwear, Inc.,* 340 U.S. 36, 39-41 (1950.)[6]

The orders of the Board are affirmed.

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[6] In view of the dictum to the contrary in *Chung Wook Myung* v. *Immigation & Naturalization Service,* 468 F.2d 627, 628 n.1 (9th Cir. 1972), this opinion has been circulated to all the active members of the court. No judge has requested that the case be heard en banc.